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**Supreme Court of the United States**

OCTOBER TERM, 1939

No. **417**

FUEL CREDIT CORPORATION, formerly DOBBINS  
TRINITY COAL COMPANY, INC.,

*Petitioner,*

*against*

THOMAS J. HOWARD, owner of the Barge  
"E. T. HALLORAN",

*Respondent,*

*and*

Steam Tug "RUSSELL IV" and RUSSELL TOWING  
COMPANY,

*Respondent Impleaded.*

**PETITION OF FUEL CREDIT CORPORATION  
FOR WRIT OF CERTIORARI, AND BRIEF  
IN SUPPORT THEREOF**

THEODORE L. BAILEY

*Proctor for Petitioner.*

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*Respondent Impleaded.*

## PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, FUEL CREDIT CORPORATION, formerly Dobbins Trinity Coal Company, Inc., prays that a writ of certiorari issue to review an interlocutory decree of the Circuit Court of Appeals for the Second Circuit (R. 162) entered June 13, 1940, reversing a decree in Admiralty of the United States District Court for the Eastern District of New York (R. 119) which dismissed the libel against Dobbins Trinity Coal Company, Inc.

## JURISDICTION

The decree of the Circuit Court was entered June 13th, 1940.

Jurisdiction of the Court is provided by Section 347 (a) of Title 28 of the United States Code.

## OPINIONS BELOW

The opinion of the Circuit Court of Appeals was written by Judge Swan with Justices Chase and Patterson concurring, and appears on page 132 of the Record. It is reported at 111 Fed. (2nd) 571.

The opinion of Judge Moscowitz in the District Court appears on page 110 of the Record, and is unreported.

## THE QUESTIONS PRESENTED

1. Where a District Judge in Admiralty has in his discretion accepted as credible the testimony of a witness who testified in open court, and has made his findings of fact based thereon, may the Circuit Court of Appeals disregard such testimony, reverse the District Judge, and substitute its own discretion and findings where the District Court has not clearly erred in a matter of fact, or wrongly applied a principle of law, or been guilty of an abuse of discretion?

2. May the Circuit Court of Appeals in Admiralty assume the power to substitute its own discretion for the discretion of the District Judge who observed the witness testify, where there has been no abuse of discretion by the District Judge because the Circuit Court of Appeals entertains a different view of how the discretion should have been exercised?

3. Has the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

4. Was the Circuit Court correct in saying in its opinion:

"But really it is immaterial whether the object struck was a submerged rock or a submerged wreck. Whichever it was, the contact and resulting damage occurred during an unexcused sheer which carried the barge close to the shore and into waters which the tug's master never intended her to enter. Evidence establishing such facts is not sufficient, in our opinion, to rebut the presumption of negligence by which the owner made his *prima facie* case against the charterer."

5. The decision herein being in conflict with the decision of the First Circuit Court of Appeals on the same matter (*Baltimore & Boston Barge Co. v. Knickerbocker S. T. Co.*, 170 Fed. 442) should this conflict be resolved by the Supreme Court?

#### STATEMENT OF FACTS

The respondent, Thomas J. Howard, owner of the Barge "E. T. Halloran", filed a libel *in personam* against the Dobbins Trinity Coal Company, Inc., a New York corporation, to recover for damages to the Barge, sustained on November 11th, 1938, while under oral day charter to Dobbins Trinity Coal Company, Inc. The damage occurred while the Barge "E. T. Halloran" was being towed by the

Tug "Russell IV" operated by the Russell Towing Company.

The principal issue at the trial was, whether the port bow corner of the Barge came into contact with a submerged, uncharted, movable object at 86th Street East River, New York Harbor, which caused the chock to pull out and the cleat to bend over, resulting in the Barge taking a sudden sheer to port; or, whether due to the negligent navigation of the towing tug, the Barge was caused to sheer at 86th Street East River and finally at 89th Street East River struck a fixed, charted rock, at the bank of the river.

The tug Captain, Olsen, a licensed master, testified that at 86th Street East River the Barge passed a drill boat anchored 100 feet off the New York shore (*fol.* 120) and that the Barge, in tow, passed 75 feet outside the drill boat (*fol.* 140), making a total of 175 feet off the shore; that, although the Barge took a sudden sheer to port, at no time did it come closer than 75 feet from the shore (*fols.* 121, 122, 142 to 145). That the depth of the water was at no time less than 40 feet (*fols.* 136, 139, 171).

The chart (Exhibit 3, R. 104) shows ample depth of water for this Barge which was drawing only 6 or 7 feet (*fol.* 247). The bottom of the Barge sustained no damage whatsoever nor did the lowest plank; the damage commencing upward of two feet or more above the bottom of the Barge (*fols.* 88, 137).

Neither when the Barge came in contact with the submerged object at 86th Street, nor at any subsequent time did the Barge stop (*fols.* 146, 284 and 300) nor strike any fixed object (*fol.* 121).

There is no testimony that the Barge sustained any jolt or jar or any other evidence that the Barge came in contact

with a fixed object. There is no testimony that the Barge came "dangerously near the shore" nor at any time was in shallow water.

After hearing the witness, Olsen, testify in open court, the District Judge remarked:

"The Court: I accept the testimony of Olsen, Master of the Russell Tug, that he towed the barge in a proper way. No negligence has been established on the part of the Russell" (*fol.* 195).

and in the findings, the District Court found (*fol.* 348)

"25. That while the said coalboat was in tow of said tug at the time and through the waters in question, she did not strike the bottom, shore, or any charted or known object and that she was at all times navigated in a depth of water far in excess of her draft.

26. That at the point where the said tow took sheer as aforesaid, there was, at low water, a depth of from 6 to 7 fathoms."

#### REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals, in substituting its own discretion for the discretion of the District Court, and in disregarding the testimony of a witness who had personally testified before and whose testimony was accepted by, the District Court, constitutes the assumption of a supervisory power over matters which should rest solely in the discretion of the District Court. The Circuit Courts of Appeal have heretofore uniformly decided that supervisory powers over such matters rests solely in the discretion of the District Court.



2. The Circuit Court of Appeals for the Second Circuit has based its opinion, alternatively, upon the theory that an unexplained sheer on the part of the towing tug, *ipso facto*, constitutes negligence. This is contrary both to a decision in the First Circuit Court of Appeals and to a previous decision in the Second Circuit and the question should be settled by this Court.

Respectfully submitted

FUEL CREDIT CORPORATION, formerly  
Dobbins Trinity Coal Company, Inc.

By THEODORE L. BAILEY  
Proctor of Record

New York, September 5, 1940.

IT IS HEREBY CERTIFIED that I have examined the foregoing Petition, that it is not filed for the purpose of delay; that in my opinion the said Petition is well founded and the case should be reviewed by this Court, and that the prayer of the Petitioner for certiorari should be granted.

THEODORE L. BAILEY  
Proctor for Petitioner.